

USDOL/OALJ Reporter

[*Ruud v. Westinghouse Hanford Co.*](#), ARB Nos. 99-023, 99-028, ALJ No. 1988-ERA-33
(ARB Apr. 18, 2002)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NOS. 99-023

99-028

ALJ CASE NO. 88-ERA-33

DATE: April 19, 2002

In the Matter of:

**CASEY RUUD,
COMPLAINANT,**

v.

**WESTINGHOUSE HANFORD COMPANY,
RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert A. Jones, Esq., *Guichard, Jones, Tarkoff, APC, Walnut Creek, CA*

For the Respondent:

Stuart R. Dunwoody, Esq., *Davis Wright Tremain, LLP, Seattle, WA*; Robert A.
Dutton, Esq., *Westinghouse Hanford Company, Richland, WA*

**APPROVAL OF SETTLEMENT AND
ORDER OF DISMISSAL WITH PREJUDICE**

This case arises out of a complaint Casey Ruud filed claiming that Westinghouse Hanford Company ("Westinghouse Hanford") violated the employee protection (whistleblower) provisions of several environmental acts when it discharged him.¹ In 1988 the parties entered into a settlement.² We now **APPROVE** the August 8, 1988 settlement and **DISMISS** Ruud's complaint with prejudice.

BACKGROUND

While the facts of this case are simple, the litigation history is quite complex, spanning more than ten years. The prior ALJ and ARB decisions are available on the U.S. Department of Labor, Office of Administrative Law Judges' web site³ under *Ruud v. Westinghouse Hanford Co.*, No. 88-ERA-33.

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I. Ruud's Employment History

Ruud worked at two nuclear facilities owned by the Department of Energy ("DOE") and managed by private contractors. From April 1985 until February 1988, Ruud worked at the Hanford Nuclear Reservation and from May 1990 until January 1991, he worked at the Savannah River Weapons Facility.

A. Hanford Nuclear Reservation

At the Hanford Nuclear Reservation, Ruud was employed first by Rockwell Hanford Operations ("Rockwell Hanford") and, after June 29, 1987, by Westinghouse Hanford. From April 1985 until October 1986 Ruud worked as an Advanced Quality Assurance Engineer. While working in this capacity, Ruud participated in several audits of facilities at the Hanford Reservation, *e.g.*, the Plutonium Finishing Plant and the Burial Ground. He also raised concerns about unsafe designs and quality assurance, environmental and radiological requirements and conditions. Ruud believed that these audit results and concerns should have caused work to stop at the Hanford facility. Rockwell Hanford officials did not agree with Ruud's stop work recommendations. Ruud brought his concerns to the media in October 1986. Eventually, he testified before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce regarding his audit findings.

In September of 1986, Ruud applied for a position in the Basalt Waste Isolation Project (BWIP) at the Hanford Reservation. This position would have been a promotion, and Ruud was told by the responsible manager that he would be transferred on October 13, 1986. However, before he could be transferred, Ruud was asked to participate in a follow-up of his audits. His transfer was postponed until November 1986.

On November 24, 1986, Ruud was transferred to the BWIP but without a promotion. When Westinghouse Hanford did not receive federal funding to continue with the BWIP, it discharged Ruud and other employees working on the project. Ruud's last day of work at the Hanford Reservation was February 29, 1988.

Prior to his discharge, Ruud had applied for another position at Westinghouse Hanford but was not selected. After Westinghouse Hanford released Ruud, it failed to select him for a permanent senior quality assurance engineer position and withdrew two other job

offers when Ruud declined to drop all claims of retaliation against Westinghouse Hanford.

After leaving Westinghouse Hanford, Ruud next worked in the nuclear industry at the Savannah River Weapons Facility.

B. Savannah River Weapons Facility

From May 29, 1990, until his resignation on January 16, 1991, Ruud worked at the Savannah River Weapons Facility. This DOE facility was managed by the Westinghouse Savannah River Company ("Westinghouse Savannah"). Westinghouse Savannah and Westinghouse Hanford are owned by the same parent corporation, Westinghouse Electric Corporation. Ruud did not work for Westinghouse Savannah but for Ri-Tech, an independent subcontractor performing training services at the Facility.

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Ruud alleged that he suffered further adverse actions at the Savannah River Facility. He alleged that Ri-Tech was pressured into removing his training duties; that he was improperly removed from the Savannah River Facility by security guards; and, that he was told that his one-year contract would not be "rolled-over" for another year. Subsequent to these events, Ruud resigned his position with Ri-Tech, believing that he had no prospect for future employment at the Savannah River Facility.

II. Procedural History

A. Complaint

On February 28, 1988, Ruud filed a hand-written complaint with the Department of Labor alleging that he was harassed, discriminated against and discharged in retaliation for testifying before Congress regarding safety issues at the Hanford Nuclear Reservation. Ruud did not specify under which environmental act he was filing his complaint.

The Department's Wage and Hour Division investigated Ruud's complaint under the Energy Reorganization Act and found that Westinghouse Hanford retaliated against Ruud for engaging in protected activity when it discharged him in February 1988. Westinghouse Hanford disagreed with this finding and requested a formal hearing before an Administrative Law Judge ("ALJ").

Prior to this hearing, the parties engaged in settlement negotiations which resulted in a written settlement agreement.

B. Settlement Agreement

The July 25, 1988 settlement agreement contained a Confidentiality clause, a portion of which prevented Ruud from making "further additional remarks or comments, either verbally or in writing, concerning his employment at Westinghouse or concerning the safety of operations at Westinghouse." Appendix to Respondent's Briefs ("Appendix"), Ex. 45, ¶ 7. The parties modified the Confidentiality clause to remove this language and initialed the modifications on August 8, 1988. Tr. at 289-91; Appendix, Ex. 46, ¶ 7. Under the terms of the settlement agreement, Ruud released all claims against Westinghouse Hanford in consideration of payment of \$115,000 and expungement of negative information from his personnel file.

The August 8, 1988 settlement agreement included the following provisions

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which are relevant to this decision:

4. AGREEMENT:

For and in consideration of the following recited payments, the parties agree that the litigation brought pursuant to Case No. 88-ERA-00033 before the United States Department of Labor Office of Administrative Law Judge[s] shall be dismissed with prejudice. The parties further agree that they shall fully and completely release each other of and from any and all claims, demands, causes or actions or suits at law or in equity arising from the employment relationship between Ruud and Westinghouse Hanford Co.

* * *

6. PERSONNEL FILE:

The parties agree that all personnel files maintained by Westinghouse regarding the employment of Ruud shall state that the reason for termination of his employment was consistent with a general reduction in work force. Any and all negative comments, file memos or other documents with respect to Ruud's employment with Westinghouse shall be purged from his personnel file or files. In the event that any prospective employer of Ruud requires or requests verbal recommendations from Westinghouse, said verbal recommendations shall be of at least a neutral tone and quality. Ruud or his legal representative shall be entitled to review any and all personnel files or records maintained by Westinghouse regarding his employment on a regular, periodic basis. Westinghouse shall prepare and place in Ruud's file a "neutral" letter of recommendation for further employment on Ruud's behalf.

7. CONFIDENTIALITY:

The parties agree that the terms and conditions of this Settlement Agreement shall remain strictly confidential and shall not be disclosed to any other person. Should Ruud, or any person obtaining the information from or by reason of Ruud's action, disclose any term or condition of this Settlement Agreement to any other person, then, notwithstanding Paragraph 4.c above, all payments due Ruud under this Settlement Agreement shall cease and not thereafter be payable by any party.

* * *

9. ENTIRE AGREEMENT:

This Settlement Agreement reflects the entire agreement between the parties and no statements, promises or inducements by any party that are not contained herein shall be valid or binding. The parties have carefully read the foregoing Settlement Agreement and know the contents thereof.

Appendix, Ex. 46.

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Based upon their settlement agreement, the parties submitted a joint stipulation for entry of an order of dismissal with prejudice. On August 3, 1988, the ALJ issued an Order of Dismissal with Prejudice. However, under the implementing regulations in effect at the time, ALJs issued only recommended decisions. "The [ALJ's] recommended decision shall contain appropriate findings, conclusions and a recommended order and be forwarded, together with the record, to the Secretary of Labor for a final order." 29 C.F.R. § 24.6(a) (1989). Cases dismissed pursuant to a settlement agreement were also forwarded so that the Secretary could review the settlement agreement. *Fuchko and Yunker v. Georgia Power*, Nos. 89-ERA-9, 10, slip op. at 1-2 (Sec'y Mar. 23, 1989) ("it is error for the ALJ to dismiss a case without reviewing the settlement and making a recommendation of whether the settlement is fair, adequate and reasonable").

The ALJ's August 3, 1988 Order of Dismissal with Prejudice was eventually forwarded to the Secretary in 1990. However, the ALJ's Order did not include a recommendation regarding the settlement nor a copy of the settlement agreement.

C. Secretary's Action

Upon receipt of the ALJ's Order of Dismissal, the Secretary noted the absence of the settlement agreement. The Secretary then ordered the parties to submit a copy of the settlement agreement because "a case may not be dismissed on the basis of a settlement unless the terms of the settlement have been reviewed and the Secretary has found them

to be fair, adequate, and reasonable." Secretary's Order to Submit Settlement, slip op. at 1 (Feb. 14, 1990) (citations omitted).

The Respondent declined to submit a copy of the agreement for the Secretary's consideration. Complainant did not respond to the Secretary's Order to Submit the Settlement. When the Secretary could not review the terms of the settlement agreement which formed the basis for dismissing the case, the Secretary rejected the ALJ's Recommended Order of Dismissal and remanded the case for a hearing on the merits. Secretary's Order of Remand (June 7, 1994).

D. March 15, 1996 ALJ Recommended Decision and Order

Upon remand from the Secretary, the case was assigned to an ALJ who held a hearing, from August 8 to 11, 1995, on Ruud's complaint. After the hearing, the ALJ issued a Recommended Decision and Order. *Ruud v. Westinghouse Hanford Co.*, ALJ No. 88-ERA-33, (ALJ Mar. 15, 1996) ("1996 ALJ R. D. & O.").

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In his R.D.&O., the ALJ first considered the 1988 settlement agreement finding that: "Settlement agreements in cases such as these are favored and encouraged." 1996 ALJ R.D.&O., slip op. at 74 (*citing Macktal v. Brown & Root*, No. 86-ERA-23 (Sec'y Nov. 14, 1989)). The ALJ recommended that the Secretary approve the settlement, finding that it was fair, adequate and reasonable for the following reasons:

First, it was voluntarily entered into, as all concede. Secondly, it was achieved by arms-length negotiation, not by any collusion. Next, both sides were represented by attorneys, and there is no allegation that Casey Ruud was incompetently represented.

Fourth, and perhaps most importantly, by the agreement Ruud was paid \$115,000, a substantial amount that was more than six times his back pay claim. I note that Ruud has not refunded any of this even while challenging the settlement. Then, too, the agreement conferred other substantial benefits on Complainant: removal of adverse information from his file and the inclusion in that file of a "neutral letter of recommendation."

1996 ALJ R. D. & O., slip op. at 74-75 (internal citations omitted).

In the event that the Secretary should disagree with his recommendation regarding approval of the settlement agreement, the ALJ also made findings regarding the merits of the case. 1996 ALJ R.D.&O., slip op. at 79.

The ALJ found jurisdiction under the CAA and CERCLA. 1996 ALJ R. D. & O., slip op at 82-83. The ALJ recommended against jurisdiction under the TSCA the SWDA, and the SDWA. 1996 ALJ R.D. & O., slip op. at 83.

The ALJ found that Westinghouse Hanford officials harassed Ruud when they: 1) assigned him to provide extensive information within a short time concerning all "out-of-compliance" supplier quality assurance programs; 2) failed to select Ruud for the position of temporary auditor at N-Reactor; and, 3) failed to select Ruud for permanent senior quality assurance engineer positions. 1996 ALJ R.D.&O., slip op. at 86-90.

The ALJ also found that Ruud suffered at least two acts of retaliation while he was employed at Westinghouse Savannah River that were attributable to his whistleblowing activities at Westinghouse Hanford: 1) Ruud was prohibited from performing his training duties at the Savannah River Facility; and, 2) Ruud was removed from the Facility under the threat of force on orders of Westinghouse Savannah's General Counsel who was formerly Westinghouse Hanford's General Counsel. 1996 ALJ R.D.&O., slip op. at 91-92.

In light of his finding of retaliation, and in lieu of the settlement amount should the Secretary decline to approve that agreement, the ALJ recommended the following damages: 1) reinstatement in the position Ruud held prior to his layoff; 2) back-pay from 1988 to the date when Ruud obtained employment with the State of Washington in May 1991; 3) attorney's fees in an amount to be determined later; and, 4) \$15,000 for emotional distress. 1996 ALJ R.D.&O., slip op. at 95-96.

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Both Ruud and Westinghouse Hanford petitioned the Board for review of the ALJ's recommended decision.

E. November 10, 1997 Administrative Review Board Decision

Ruud argued that the settlement agreement should not be approved because: 1) the Confidentiality clause of the agreement prevented the parties from providing the Secretary with a copy of the settlement agreement to review; and, 2) the agreement was secured through fraud and coercion. Ruud also argued that jurisdiction lay under all the environmental acts including the FWPCA, the SWDA, the TSCA and the SDWA. Ruud argued that the award of damages should be increased to include: 1) annual salary increases equal to at least the highest increases actually given to employees in his position; 2) all fringe benefits; 3) the amount (\$25,000) Ruud expended in attorney's fees to obtain the 1988 settlement; 4) \$250,000 for emotional distress; and, 5) ,000,000 in exemplary damages.

Westinghouse Hanford argued that the case should have been dismissed in 1988 because the parties' motion for dismissal should have been treated as a motion for

voluntary dismissal which did not require the Secretary to review the settlement agreement. In the alternative, Westinghouse Hanford argued that the settlement should be approved because nothing in the agreement prevented the Secretary from reviewing and approving it and because the agreement itself was not void for fraud. With regard to the merits, Westinghouse Hanford argued: that Ruud had not engaged in protected activity; that Westinghouse Hanford was not aware of any protected disclosures by Ruud; and, that the ALJ's findings on retaliation were not supported by substantial evidence.

Westinghouse also argued that the award of back-pay damages should be reduced because: it was not responsible for the seven-year delay between the filing of Ruud's 1988 complaint and the 1995 hearing; Ruud voluntarily left employment with Ri-Tech in 1991; and Ruud's recovery for his South Carolina state court action should be credited against the liability for back pay.⁴ Westinghouse Hanford argued that the claim for compensatory damages due to emotional distress should be limited to emotional distress suffered at the Hanford Nuclear Reservation in light of the fact that Ruud's South Carolina settlement included compensation for emotional distress suffered as a result of events at the Savannah River Facility. Westinghouse Hanford also argued that Ruud's claim for punitive damages should be dismissed because jurisdiction under the TSCA or SWDA had not been established and, in the alternative, because there had been no finding of wanton conduct or reckless disregard by Westinghouse Hanford.

Upon review of the 1996 ALJ R.D.&O., the Board disapproved the 1988 settlement agreement for two reasons. The Board found that Westinghouse Hanford had breached a material term of the settlement agreement by interfering with Ruud's prospective employment. *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 88-ERA-33, slip op. at 16 (ARB Nov. 10, 1997) ("1997 ARB Decision"). The Board also found there had been a mutual misunderstanding regarding a material clause of the settlement agreement which prevented the parties from reaching an agreement. 1997 ARB Decision, slip op. at 18.

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The Board concluded that Westinghouse Hanford and Westinghouse Savannah River employees had breached the Personnel File clause of the settlement agreement based upon the ALJ's finding that Ruud suffered retaliation while he was employed at the Savannah River Facility attributable to his whistleblowing activities at Westinghouse Hanford. 1997 ARB Decision, slip op. at 16-17. The Board pointed to the fact that Ruud wanted to prevent interference with his prospective employment while Westinghouse Hanford and Westinghouse Savannah River managers did not hesitate to compel Ruud's constructive discharge. "The settlement, as effectuated, thus was not fair, adequate and reasonable because it did not afford Ruud the benefit of a material term." 1997 ARB Decision, slip op. at 18.

The Board also disapproved the settlement on the basis that there had been a mutual misunderstanding regarding the interpretation of the Personnel File clause of the

settlement agreement noting: "[Westinghouse Hanford] possibly read the [Personnel File] provision solely to refer to the content of personnel documents and references; whereas Ruud read it, reasonably we find, to prohibit [Westinghouse Hanford] from interfering in any manner with prospective employment." 1997 ARB Decision, slip op. at 18.

Although the Board relied on the ALJ's findings of violations at the Savannah River Facility to disapprove the settlement agreement, the Board declined to adopt the ALJ's finding of violation at the Savannah River Facility. 1997 ARB Decision, slip op. at 25. The Board remanded the case to give Westinghouse Hanford an additional opportunity to defend against the evidence of violations of the whistleblower statutes at the Savannah River Facility. *Id.* The Board also directed Ruud to state for the record the basis for the portion of the complaint alleging retaliation at the Savannah River Facility during 1990 and 1991 and the recovery requested.⁵ *Id.* The Board did adopt the ALJ's findings of violations at the Hanford facility and that the settlement agreement as originally proposed by Westinghouse Hanford and signed by Ruud on July 25, 1988, contained a "gag" provision which violated public policy and constituted an unlawful adverse action. 1997 ARB Decision, slip op. at 25-26.

Finally, the Board found coverage under the SDWA because Ruud discussed leakage of nuclear waste into groundwater and the Columbia River during hearings convened by a Congressional Subcommittee. 1997 ARB Decision, slip op. at 11. Upon remand the Board directed the ALJ to calculate exemplary damages under the SDWA. *Id.* The Board also directed the ALJ to avoid duplicative recovery by considering the South Carolina state court settlement. 1997 ARB Decision, slip op. at 26.

F. Court Actions

In January of 1993 Ruud filed an action in the U.S. District Court for the Eastern District of Washington against Westinghouse Hanford, Westinghouse Savannah, and some of their employees alleging, among other things, violations of federal statutory and U.S. Constitutional law with supplemental state claims covering actions of the defendants both in Washington State and South Carolina. *Ruud v. Westinghouse Hanford Co.*, Case No. CY-93-30001-JLQ. The district court dismissed the federal action with prejudice, and dismissed the state actions without prejudice. Ruud then refiled actions against the appropriate defendants in the relevant states.

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In the South Carolina Court of Common Pleas Ruud claimed, among other things, that Westinghouse Savannah River and several of its employees tortiously interfered with his employment contract with Ri-Tech. The parties settled this case. *Ruud v. Westinghouse Savannah River Co.*, Case No. 94-CP-02-486 (South Carolina Ct. of Common Pleas Apr. 16, 1996) (order of dismissal with prejudice). For consideration of \$300,000 Ruud released Westinghouse Savannah River and its named employees "from any and all

claims or causes of action that were pending in this case at the time that trial of this action had been set to commence." Appendix, Ex. 23, & 3.

In the Benton County Washington State Superior Court Ruud claimed, among other things, that Westinghouse Hanford and several of its employees wrongfully discharged him because of his protected activity; fraudulently promised they would not interfere with his future employment; and, breached the 1988 agreement settling his whistleblower complaint. Defendants moved for summary judgment which the court granted. *Ruud v. Westinghouse Hanford Co.*, Cause No. 94-2-01042-2 (Washington State Superior Ct. Sept. 14, 1998). Appendix, Ex. 36.⁶

G. December 8, 1998 ALJ Recommended Decision and Order

When the ALJ received the Board's November 10, 1997 Decision and Order of Remand, he scheduled the case for hearing.

In its brief, Respondent argued that the 1996 settlement of Ruud's South Carolina Court action against Westinghouse Savannah River removed any need to litigate the Savannah River allegations on remand because Ruud's release exonerated Westinghouse Hanford and because the amount recovered should be used to offset any award of damages. The Board had remanded the case to provide Westinghouse Hanford "an additional opportunity to defend against evidence of violation at Savannah River." 1997 ARB Decision, slip op. at 25. Rather than offering evidence regarding this issue, Westinghouse Hanford chose instead to argue that Westinghouse Savannah River was not the agent or alter ego of Westinghouse Hanford thus contesting the basis for the Board's conclusion that the settlement agreement was breached. Westinghouse Hanford also argued that it was not liable for the actions of Westinghouse Savannah River's employees.

In the event that the ALJ found Westinghouse Hanford liable, it argued that the award of damages should be reduced by terminating back-pay on the date Ruud left employment with Ri-Tech and by eliminating the award of front-pay.

Ruud argued: 1) that the ALJ should not approve the 1988 settlement agreement because the Board had disapproved the agreement and had not remanded for reconsideration of the settlement; 2) that the ALJ should not approve the settlement because the Board had found that there was never an actual agreement on a material term; 3) that Westinghouse Hanford had waived any argument concerning retaliatory conduct at the Savannah River Facility and that the Board's determination that Westinghouse Hanford was liable for the retaliatory conduct of its former employees should be affirmed; 4) that no additional findings of retaliation at the Savannah River Facility were necessary to award damages because Westinghouse Hanford had taken no action to insure that its employees ceased their retaliatory activities; and, 5) that the terms of the 1996 South Carolina state court settlement were limited to damages for emotional distress at the Savannah River Facility in South Carolina.

With respect to damages Ruud also contended: 1) that, although he was not seeking any further personal injury damages for actions taken in South Carolina, the 1996 settlement amount should not reduce any damages for claims against Westinghouse Hanford; 2) that \$25,000 of the \$115,000 he received for the 1988 settlement actually went to his lawyers for attorneys' fees and should not be credited against his damage award; 3) that he was entitled to back-pay from the time of injury through the date of the award; 4) that front-pay should be awarded in accordance with the prior ALJ award; 5) that emotional distress damages in the amount of \$250,000 should be awarded; and, 6) that exemplary damages in the amount of ,000,000 be awarded.

The ALJ held, "I cannot again ask the Board to approve the settlement when it has ruled that it will not approve it and when little if any evidence on the subject of breach has been proffered." *Ruud v. Westinghouse Hanford Co.*, ALJ No. 88-ERA-33, slip op. at 4 (ALJ Dec. 8, 1998) ("1998 ALJ R. D. & O.").

The ALJ recommended that Westinghouse Hanford: 1) reinstate Ruud to the position he held prior to his layoff; 2) pay back-pay from 1988 through 1998; 3) if reinstatement is not feasible, pay front-pay calculated on the basis of his remaining expected professional life (including fringe benefits), less the salary he would be expected to earn in his job with Washington State, discounted at a rate of 3%; and, 4) pay exemplary damages in the amount of \$8,337.50. 1998 ALJ R.D.&O., slip op. at 9.

PRESENT APPEAL

Both Ruud and Westinghouse Hanford have petitioned the Board for review of the 1998 ALJ R. D. & O.

Westinghouse Hanford argues that the Board was precluded by prior case law from disapproving the 1988 settlement based upon an allegation of breach. Westinghouse Hanford also argues that it did not breach the agreement pointing to the Benton County, Washington Superior Court dismissal of Ruud's breach of settlement suit which it claims should be given preclusive effect. Westinghouse Hanford argues that it did not retaliate against Ruud at the Savannah River Facility; that it should not be held vicariously liable for the activities at the Facility; and, that it should be entitled to the benefits of Ruud's release of Westinghouse Savannah River. Finally, Westinghouse Hanford argues that the amount of damages was too high because: 1) back pay should have terminated when Ruud voluntarily left his employment with Ri-Tech; 2) any award after Ruud's constructive discharge from Ri-Tech should be offset against the \$300,000 settlement of the Savannah River case; and, 3) the award of front-pay for the remainder of Ruud's life was inappropriate.

Ruud argues that the Board's disapproval of the 1988 settlement should not be reconsidered because it is the law of the case and that Respondent has not sustained its burden for requiring reconsideration. Ruud argues that it is irrelevant that he has dropped

his claim for personal injury damages arising from the Savannah River Facility because such damages are not relevant to any damages he suffered as a result of actions taken at the Hanford Facility.⁷ Ruud states that the ALJ's back-pay award is correct, that the award of front-pay should be affirmed, and that he should be awarded punitive damages and attorneys' fees.

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JURISDICTION

We have jurisdiction to issue final orders under the Clean Air Act, 42 U.S.C. § 7622(b) (1994) and the Comprehensive Environmental Response, Compensation and Liability Act, 49 U.S.C. § 9610(b) (1994).⁸

STANDARD OF REVIEW

In reviewing the ALJ's recommended decision, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C. § 557(b) (1994). Accordingly, the Board is not bound by either the ALJ's findings or his conclusions of law, but reviews both *de novo*. See *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000) and the materials cited therein.

DISCUSSION

Although this case has spawned years of litigation, it remains essentially a complaint arising out of Ruud's employment at the Hanford Reservation which the parties attempted to resolve by a settlement. The parties engaged in the initial settlement negotiations and reached an agreement. However, when the Board reviewed the settlement agreement in 1997, there appeared to be significant reasons to disapprove it. See, e.g., ARB No. 96-087, slip op. at 18 ("We decline to 'enter into' a settlement when evidence shows that a material term has been breached.").

Nevertheless, since the Board's 1997 decision, several factors have altered our view of the settlement agreement. Contrary to Complainant's contentions, we are not bound by the "law of the case" doctrine, which is discretionary and does not limit our power to reconsider our decision prior to final judgment if we determine that our earlier ruling was erroneous. *Cristianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988); *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1197 (11th Cir. 1993); *In re U.S. Postal Service ANET and WNET Contracts*, ARB No. 98-131, slip op. at 12 (Aug. 4, 2000).

First, the issue of whether or not a settlement agreement has been breached is not a matter for the Board to determine. In a decision rendered after the Board's 1997 *Ruud* decision, the Third Circuit pointed out that the Secretary does not have the authority to enforce settlement agreements. *Williams v. Metzler*, 132 F.3d 937, 942 (3d Cir. 1997)

(suit for breach of contract is cognizable only in Article III court unless Congress provides otherwise by statute); *accord Pillow v. Bechtel Constr., Inc.*, ARB No. 97-040, ALJ No. 87-ERA-35 (ARB Sept. 11, 1997). Under the environmental acts, the authority to hear a suit for breach of a settlement agreement is vested in the U.S. district courts. *See, e.g.*, 42 U.S.C. § 7622(e)(1). Where, as in the present case, a party claims that there has been a breach of the settlement agreement, that party should seek redress in a court of competent jurisdiction. Where the breach consists of actionable retaliation, the party should also consider whether to file a new whistleblower complaint.

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Such an approach also is more consistent with prior cases of the Secretary and the Board which have held that breach of a settlement agreement is not a basis to disapprove or rescind a settlement. *See Blanch v. Northeast Nuclear Energy Co.*, No. 90-ERA-11 (Sec'y May 11, 1994) (violation of a settlement may constitute a separate, independent violation of the ERA, but not basis to disapprove settlement); *Gillian v. Tennessee Valley Auth.*, No. 89-ERA-40 (Sec'y Apr. 12, 1994) (complainant's premature assertion that Respondent breached the agreement insufficient reason to disapprove the settlement); *O'Sullivan v. Northeast Nuclear Energy Co.*, No. 90-ERA-35, (Sec'y Dec. 10, 1990) (claim that respondent violated the terms of the settlement and/or committed new violations of the ERA may be the basis of a new complaint but not for declaring the settlement void). Furthermore, in decisions issued subsequent to the Board's 1997 *Ruud* decision, we have rejected efforts to void settlements based upon claims of breach. *See Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 96-ERA-34, 38 (ARB Mar. 30, 2001) (rejecting claim that employer breached ERA settlement agreement by refusing to release medical records); *Balog v. Med-Safe Systems, Inc.*, ARB No. 99-034, ALJ No. 95-TSC-9 (ARB Sept. 13, 2000) (rejecting repudiation of settlement based upon complainant's allegation of breach occurring in the three years between ALJ's recommended decision and date forwarded to Board for review).⁹

Second, the Board's 1997 decision declined to approve the settlement on the alternative ground that there appeared to be a misunderstanding regarding a material term of the settlement agreement. This finding was based upon the subsequent adverse actions Ruud suffered at the Savannah River Facility. The Board assumed that there was a misunderstanding because, as noted above, Westinghouse Hanford read the Personnel File provision one way and Ruud another. However, the Board's finding of misunderstanding regarding this material term appears to have been based upon extrinsic evidence.

At the 1995 ALJ hearing, Ruud testified regarding the negotiations relative to the written terms of the settlement agreement. Tr. 280-81. This testimony establishes that the parties negotiated over the terms of the Personnel File clause of the settlement agreement and that their negotiations were reduced to writing with an integration clause. Both parties then signed the agreement. The settlement agreement as signed is an integrated agreement.

The Personnel File clause is unambiguous. Ruud's testimony that he "wanted to ensure that they weren't going to at any time in the future step in the way or do anything negative toward my employment" (Tr. at 280) is parol evidence which may not be admitted to contradict the terms of an unambiguous binding and completely integrated agreement. Restatement (Second) of Contracts § 215 cmt. a (1979) ("A binding integrated agreement discharges inconsistent prior agreements, and evidence of a prior agreement is therefore irrelevant to the rights of the parties when offered to contradict a term of the writing.")

Even were we to admit Ruud's testimony, it hardly compels a finding that there was a misunderstanding. Ruud's testimony establishes that he may have wanted an "iron-clad" guarantee that Westinghouse Hanford would not do anything to affect his employment anywhere. However, Ruud's attorney essentially advised him that the language in the settlement was the best that he could get and Ruud signed the agreement with this knowledge. Tr. at 281, ln. 10-18.

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Finally, for two additional reasons we need not address whether the settlement agreement was breached. First, the outcome of Ruud's suit against Westinghouse Savannah was a global settlement of all claims against Westinghouse Savannah and its named employees. *See* Appendix, Ex. 23, & 3.¹⁰ Second, although Ruud continues to argue that Respondent breached the Confidentiality clause of the settlement agreement, we agree with the ALJ's conclusion that any such breach was non-material and involved a provision that did not concern Ruud. 1996 ALJ R. D. & O., slip op. at 77-78 ("To allow Complainant to torpedo a settlement agreement on the basis of a provision that he never cared about and which was only included at the instigation of [Westinghouse Hanford] for its own benefit would be a gross miscarriage of justice.").

CONCLUSION

As we have discussed in this decision, our view of the settlement agreement has changed due to several intervening factors. However, the parties remain essentially in the same position they were *status quo ante* relative to the settlement. Ruud and Westinghouse Hanford negotiated a settlement agreement which both parties signed. We agree with the ALJ who found that the settlement is fair, adequate and reasonable. 1996 ALJ R. D. & O., slip op. at 74-75.

Where the parties have negotiated a settlement they are bound "to their initial consent until [the Secretary] has time to review the settlement." *Macktal v. Sec'y of Labor*, 923 F.2d 1150, 1157 (5th Cir. 1991). Where the circumstances have not changed materially we will hold the parties to the terms of their settlement agreement and approve the agreement. *Balog*, ARB No. 99-034, slip op. at 6-7.

We find that the circumstances have not changed materially and therefore **APPROVE** the August 8, 1988 settlement agreement and **DISMISS** Ruud's complaints with prejudice.¹¹

SO ORDERED.

WAYNE C. BEYER

Administrative Appeals Judge

JUDITH S. BOGGS

Administrative Appeals Judge

M. CYNTHIA DOUGLASS

Chief Administrative Appeals Judge

[ENDNOTES]

¹ Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1994) (ERA); the Clean Air Act, 42 U.S.C. § 7622 (1994) (CAA); the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1994) (SDWA); the Toxic Substances Control Act, 15 U.S.C. § 2622 (1994) (TSCA); the Solid Waste Disposal Act, 42 U.S.C. § 6971 (1994) (SWDA); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (1994) (CERCLA); and the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1994) (FWPCA).

² Ruud and Westinghouse Hanford signed the settlement agreement on July 25, 1988. On August 8, 1988, the parties modified the agreement to remove language prohibiting Ruud from making additional remarks or comments either verbally or in writing regarding his employment at Westinghouse or concerning the safety operations at Westinghouse. Transcript of the August 8, 1995 ALJ Hearing ("Tr.") at 286-91.

³ <http://www.oalj.dol.gov/libwhist.htm>

⁴ See the discussion below in Section II F regarding Ruud's state court actions.

⁵ In accordance with the Board's instructions, Ruud filed a Revised Supplemental Complaint with the ALJ on December 22, 1997. We do not reach the question of whether there were violations at the Savannah River Facility because of our disposition of this appeal.

⁶ We do consider whether the Washington State Superior Court order affects the outcome of the present appeal because the Court's order does not contain a basis for its decision.

⁷ "Given Complainant's concession in this remand that he is not seeking any personal injury damages for conduct directed at him by anyone at Savannah River in that he has already recovered for such personal injuries through his settlement at trial in South

Carolina, there appears to be no issue remaining to be addressed by this Board other than the actual amount of damages to which Complainant should be entitled, including punitive damages, for the actions taken against him at Hanford before he was ever employed at the Savannah Rivers site." Complainant and Cross-Petitioner's Brief in Opposition to Respondent's Opening Brief at 6.

⁸ The Secretary of Labor has delegated authority and assigned responsibility to this Board to act for her in issuing final agency decisions on questions of law and fact arising in review or on appeal under the whistleblower provisions of the environmental acts. Secretary's Order, 61 Fed. Reg. 19,978 (May 3, 1996). *See also* 29 C.F.R. § 24.8 (2001).

⁹ The peculiar sequence of events which caused many of the problems in this case, *i.e.*, a multiple-year delay between the date the parties signed the settlement and the date the Secretary reviewed it for approval, appears to have been addressed by a change in the regulations which provides that: "The recommended decision of the administrative law judge shall become the final order of the Secretary unless, pursuant to § 24.8, a petition for review is timely filed with the Administrative Review Board." 29 C.F.R. § 24.7(d) (2001).

¹⁰ As noted above, Ruud has also withdrawn any claim for money damages related to the events at Savannah River.

¹¹ The settlement agreement fully and completely releases all of Ruud's claims arising out of his employment with Westinghouse Hanford, including that of SDWA coverage. For this reason we do not address the issue of punitive damages.